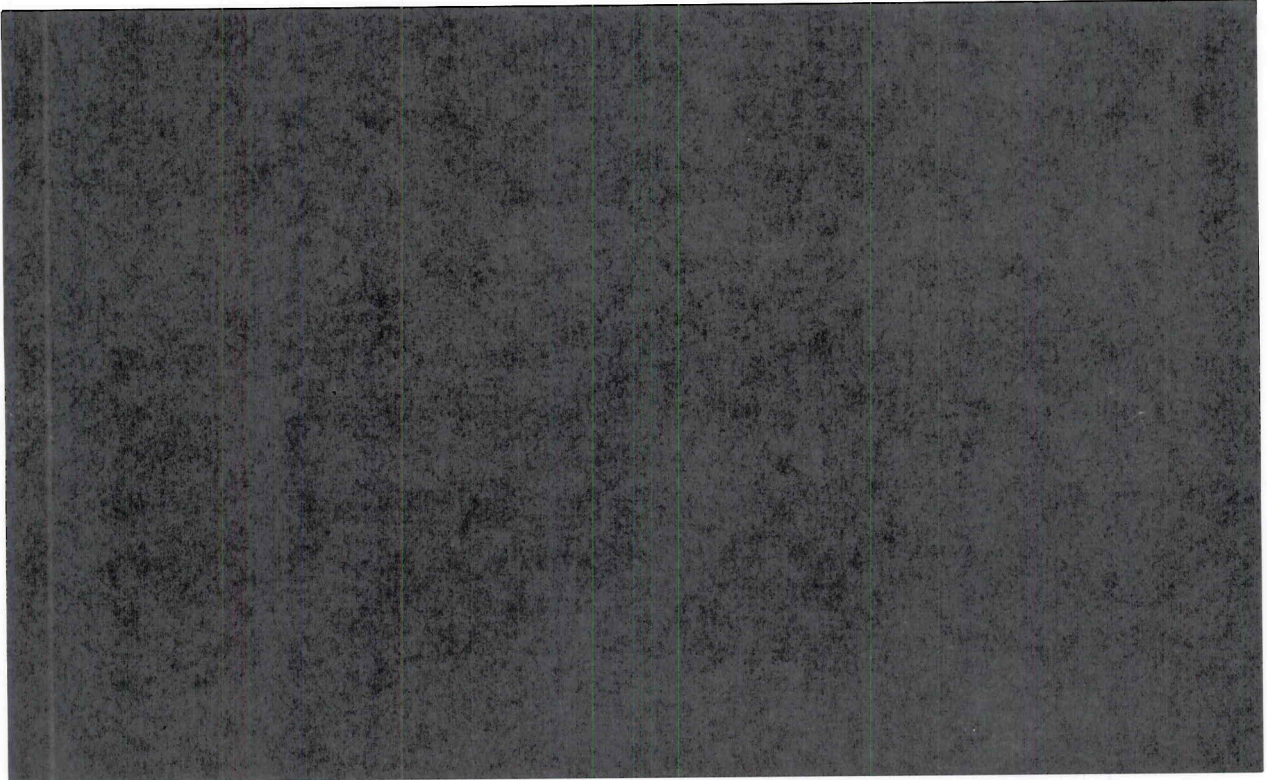


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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



MEMORANDUM OPINION

These matters are before the Foreign Intelligence Surveillance Court ("FISC" or "Court") on: (1) the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications

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[REDACTED], which was filed on April 20, 2011; (2) the “Government’s Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications” for DNI/AG 702(g) Certifications [REDACTED], which was filed on April 22, 2011; and (3) the “Government’s Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications” for DNI/AG 702(g) Certifications [REDACTED], which was also filed on April 22, 2011.¹

Through these submissions, the government seeks approval of the acquisition of certain telephone and Internet communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act (“FISA” or the “Act”), 50 U.S.C. § 1881a, which requires judicial review for compliance with both statutory and constitutional requirements. For the reasons set forth below, the government’s requests for approval are granted in part and denied in part. The Court concludes that one aspect of the proposed collection – the “upstream collection” of Internet transactions containing multiple communications – is, in some respects, deficient on statutory and constitutional grounds.

¹ For ease of reference, the Court will refer to these three filings collectively as the “April 2011 Submissions.”

I. BACKGROUND

A. The Certifications and Amendments

The April 2011 Submissions include DNI/AG 702(g) Certification [REDACTED]
[REDACTED]
[REDACTED], all of which were executed by the Attorney General and the Director of National Intelligence ("DNI") pursuant to Section 702. [REDACTED] previous certifications have been submitted by the government and approved by the Court pursuant to Section 702. [REDACTED]
[REDACTED] (collectively, the "Prior 702 Dockets"). Each of the April 2011 Submissions also includes supporting affidavits by the Director or Acting Director of the National Security Agency ("NSA"), the Director of the Federal Bureau of Investigation ("FBI"), [REDACTED] two sets of targeting procedures, for use by NSA and FBI respectively; and three sets of minimization procedures, for use by NSA, FBI, and CIA, respectively.²

Like the acquisitions approved by the Court in the eight Prior 702 Dockets, collection

² The targeting and minimization procedures accompanying Certification [REDACTED] are identical to those accompanying [REDACTED]. As discussed below, the NSA targeting procedures and FBI minimization procedures accompanying Certifications [REDACTED] also are identical to the NSA targeting procedures and FBI minimization procedures that were submitted by the government and approved by the Court for use in connection with Certifications [REDACTED]. The FBI targeting procedures and the NSA and CIA minimization procedures that accompany the April 2011 Submissions differ in several respects from the corresponding procedures that were submitted by the government and approved by the Court in connection with Certifications [REDACTED].

under Certifications [REDACTED] is limited to "the targeting of non-United States persons reasonably believed to be located outside the United States." Certification [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The April 2011 Submissions also include amendments to certifications that have been submitted by the government and approved by the Court in the Prior 702 Dockets. The amendments, which have been authorized by the Attorney General and the DNI, provide that information collected under the certifications in the Prior 702 Dockets will, effective upon the Court's approval of Certifications [REDACTED], be handled subject to the same

revised NSA and CIA minimization procedures that have been submitted for use in connection with Certifications [REDACTED]

[REDACTED]

B. The May 2 “Clarification” Letter

On May 2, 2011, the government filed with the Court a letter pursuant to FISC Rule 13(a) titled “Clarification of National Security Agency’s Upstream Collection Pursuant to Section 702 of FISA” (“May 2 Letter”). The May 2 Letter disclosed to the Court for the first time that NSA’s “upstream collection”³ of Internet communications includes the acquisition of entire “transaction[s]” [REDACTED]

[REDACTED]⁴ According to the May 2 Letter, such transactions may contain data that is wholly unrelated to the tasked selector, including the full content of discrete communications that are not to, from, or about the facility tasked for collection. See id. at 2-3. The letter noted that NSA uses [REDACTED] to ensure that “the person from whom it seeks to obtain foreign intelligence information is located overseas,” but suggested that the government might lack confidence in the effectiveness of such measures as applied to Internet transactions. See id. at 3 (citation omitted).

³ The term “upstream collection” refers to NSA’s interception of Internet communications as they transit [REDACTED], rather than to acquisitions directly from Internet service providers such as [REDACTED].

⁴ The concept of “Internet transactions” is discussed more fully below. See infra, pages 27-41 and note 23.

C. The Government's First Motion for Extensions of Time

On May 5, 2011, the government filed a motion seeking to extend until July 22, 2011, the 30-day periods in which the Court must otherwise complete its review of Certifications [REDACTED], and the amendments to the certifications in the Prior 702 Dockets. See Motion for an Order Extending Time Limit Pursuant to 50 U.S.C. § 1881a(j)(2) at 1 ("May Motion"). The period for FISC review of Certification [REDACTED] was then set to expire on May 20, 2011, and the period for review of the other pending certifications and amendments was set to expire on May 22, 2011. Id. at 6.⁵

The government noted in the May Motion that its efforts to address the issues raised in the May 2 Letter were still ongoing and that it intended to "supplement the record . . . in a manner that will aid the Court in its review" of the certifications and amendments and in making the determinations required under Section 702. Id. at 7. According to the May Motion, however, the government would "not be in a position to supplement the record until after the statutory time limits for such review have expired." Id. The government further asserted that granting the requested extension of time would be consistent with national security, because, by operation of

⁵ 50 U.S.C. § 1881a(i)(1)(B) requires the Court to complete its review of the certification and accompanying targeting and minimization procedures and issue an order under subsection 1881a(i)(3) not later than 30 days after the date on which the certification and procedures are submitted. Pursuant to subsection 1881a(i)(1)(C), the same time limit applies to review of an amended certification or amended procedures. However, 50 U.S.C. § 1881a(j)(2) permits the Court, by order for reasons stated, to extend "as necessary for good cause in a manner consistent with national security," the time limit for the Court to complete its review and issue an order under Section 1881a(i)(3).

statute, the government's acquisition of foreign intelligence information under Certifications

[REDACTED] could continue pending completion of the Court's review. See id. at 9-10.

On May 9, 2011, the Court entered orders granting the government's May Motion. Based upon the representations in the motion, the Court found that there was good cause to extend the time limit for its review of the certifications to July 22, 2011, and that the extensions were consistent with national security. May 9, 2011 Orders at 4.

D. The May 9 Briefing Order

Because it appeared to the Court that the acquisitions described in the May 2 Letter exceeded the scope of collection previously disclosed by the government and approved by the Court, and might, in part, fall outside the scope of Section 702, the Court issued a Briefing Order on May 9, 2011 ("Briefing Order"), in which it directed the government to answer a number of questions in writing. Briefing Order at 3-5. On June 1, 2011, the United States filed the "Government's Response to the Court's Briefing Order of May 9, 2011" ("June 1 Submission"). After reviewing the June 1 Submission, the Court, through its staff, directed the government to answer a number of follow-up questions. On June 28, 2011, the government submitted its written responses to the Court's follow-up questions in the "Government's Response to the Court's Follow-Up Questions of June 17, 2011" ("June 28 Submission").

E. The Government's Second Motion for Extensions of Time

The Court met with senior officials of the Department of Justice on July 8, 2011, to

discuss the information provided by the government in the June 1 and June 28 Submissions. During the meeting, the Court informed the government that it still had serious concerns regarding NSA's acquisition of Internet transactions and, in particular, whether the Court could make the findings necessary to approve the acquisition of such transactions pursuant to Section 702. The Court also noted its willingness to entertain any additional filings that the government might choose to make in an effort to address those concerns.

On July 14, 2011, the government filed a motion seeking additional sixty-day extensions of the periods in which the Court must complete its review of DNI/AG 702(g) Certifications [REDACTED], and the amendments to the certifications in the Prior 702 Dockets. Motion for Orders Extending Time Limits Pursuant to 50 U.S.C. § 1881a(j)(2) ("July Motion").⁶

In its July Motion, the government indicated that it was in the process of compiling additional information regarding the nature and scope of NSA's upstream collection, and that it was "examining whether enhancements to NSA's systems or processes could be made to further ensure that information acquired through NSA's upstream collection is handled in accordance with the requirements of the Act." *Id.* at 8. Because additional time would be needed to supplement the record, however, the government represented that a 60-day extension would be necessary. *Id.* at 8, 11. The government argued that granting the request for an additional extension of time would be consistent with national security, because, by operation of statute, the

⁶ As discussed above, by operation of the Court's order of May 9, 2011, pursuant to 50 U.S.C. § 1881a(j)(2), the Court was required to complete its review of, and issue orders under 50 U.S.C. § 1881a(i)(3) concerning, DNI/AG 702(g) Certifications [REDACTED] and the amendments to the certifications in the Prior 702 Dockets, by July 22, 2011. *Id.* at 6.

government's acquisition of foreign intelligence information under Certifications [REDACTED]

[REDACTED] could continue pending completion of the Court's review. Id. at 9-10.

On July 14, 2011, the Court entered orders granting the government's motion. Based upon the representations in the motion, the Court found that there was good cause to extend the time limit for its review of the certifications to September 20, 2011, and that the extensions were consistent with national security. July 14, 2011 Orders at 4.

F. The August 16 and August 30 Submissions

On August 16, 2011, the government filed a supplement to the June 1 and June 28 Submissions ("August 16 Submission"). In the August 16 Submission, the government described the results of "a manual review by [NSA] of a statistically representative sample of the nature and scope of the Internet communications acquired through NSA's . . . Section 702 upstream collection during a six-month period." Notice of Filing of Aug. 16 Submission at 2. Following a meeting between the Court staff and representatives of the Department of Justice on August 22, 2011, the government submitted a further filing on August 30, 2011 ("August 30 Submission").

G. The Hearing and the Government's Final Written Submission

Following review of the August 30 Submission, the Court held a hearing on September 7, 2011, to ask additional questions of NSA and the Department of Justice regarding the government's statistical analysis and the implications of that analysis. The government made its

final written submissions on September 9, 2011, and September 13, 2011 ("September 9 Submission" and "September 13 Submission," respectively).

H. The Final Extension of Time

On September 14, 2011, the Court entered orders further extending the deadline for its completion of the review of the certifications and amendments filed as part of the April Submissions. The Court explained that "[g]iven the complexity of the issues presented in these matters coupled with the Court's need to fully analyze the supplemental information provided by the government in recent filings, the last of which was submitted to the Court on September 13, 2011, the Court will not be able to complete its review of, and issue orders . . . concerning [the certifications and amendments] by September 20, 2011." [REDACTED]

[REDACTED]

[REDACTED] The Court further explained that although it had originally intended to extend the deadline by only one week, the government had advised the Court that "for technical reasons, such a brief extension would compromise the government's ability to ensure a seamless transition from one Certification to the next." [REDACTED]

[REDACTED]

[REDACTED] Accordingly, the Court extended the deadline to October 10, 2011. [REDACTED]

[REDACTED]